

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1625 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ONGC CORPORATION LTD.

Versus

ESSAR GUJARAT LTD.

Appearance:

MR BR SHAH, Sr. Counsel with MR MS RAO for
Appellant.

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE H.R.SHELAT

Date of decision: 23/06/97

ORAL ORDER: (Per J.N. Bhatt, J.)

By this appeal under Section 29(1)(vi) of the Arbitration Act, 1940 (Act), the challenge is against the order and judgment dated 1.11.1996, recorded by the learned Civil Judge (J.D.), Ahmedabad (Rural), Ahmedabad, passed in

Civil Misc. Application No.3 of 1995, which was filed by the Arbitrators under Section 14 of the Act.

A few material and relevant facts giving rise to this appeal may first be articulated at the outset, so as to examine and appreciate the merits of appeal and challenge against it, in view of the disputes and differences which had arisen between the parties, namely, appellant-ONG Corporation Ltd. (Corporation) - original opponent and M/s Essar Gujarat Ltd., respondent herein-original claimant. The parties are, hereinafter, referred to as "claimant-company" and "opponent-corporation" for the sake of convenience and brevity.

There was a contract, being Contract No.BDA/SP/CBPP/SCON/100(R)/86/ESSAR/C-004 dated 13th September, 1988, for charter hire of four mobile rigs for drilling in Gujarat, wherein, Arbitration Clause 26 provided for reference of disputes and differences to the arbitration. The reference was entered upon on 5th October, 1993, in view of the disputes and differences between the claimant-company and the opponent-corporation, with regard to the aforesaid contract. The award of the arbitration was required to be made on or before 4th February, 1994. However, time to make the award came to be extended by virtue of the Arbitration Clause by consent of parties from time to time and, finally, it stood extended upto 28th February, 1995.

In the preliminary meeting held on 30th March, 1992, the claimants filed statement of claim along with the copy of the contract and other supporting documents. On 30th April, 1992, respondent-corporation also filed written statement along with supporting documents, Volumes I and II. Thereafter, claimant-company filed rejoinder on 12th May, 1993.

At the very first hearing before the arbitrators, the parties agreed that no oral evidence will be led and the matter was sought to be decided on documentary evidence and pleadings.

After having held not less than 11 meetings by the arbitrators and considering the documentary evidence produced by both the sides as also after hearing both the parties, the arbitrators made and published the award on 16th December, 1994.

As per the decision of the parties, following two arbitrators were appointed, who entered upon the reference on 5th October, 1993, pursuant to Arbitration

Clause 26 contained in the contract for the arbitration and resolution of disputes and differences between the parties:-

- (1) A. Jayagopal.
- (2) Justice V.D. Tulzapurkar (Retired Hon'ble Judge of the Supreme Court).

An application under Section 14 of the Act came to be made on 16th January, 1995, by the arbitrators for getting it Rule of the Court. The learned Civil Judge (S.D.), Ahmedabad (Rural), after issuing notice and considering the claims and objections against them and hearing the parties, rejected the objections filed, at Ex.14, and made the award of the arbitrators the Rule of the Court, directing for decree to be drawn in terms of the award by a judgment and order on 1st day of November, 1996, which is directly under challenge in this appeal.

Following objections came to be raised, requesting the Trial Court to set aside the award, invoking the aids of the provisions of Sections 30 and 31 of the Act :-

- (a) That the award made in respect of claim No.1, 2, 3, 4, 6A and 6B is contrary to the provisions of the law and is not warranted by the facts and circumstances of the case.
- (b) That the award against the applicant has been made in violation of the principles of justice and fair play.
- (c) That the learned arbitrators have not given due weightage to the terms of the contract.
- (d) The learned arbitrators having rightly held that the contract including article 6 stipulating liquidated damages was entered into quite voluntarily by the opponent, they materially erred in holding that the applicant was not entitled to levy damages as per the said article but was entitled only to some reasonable compensation as contemplated by section 74 of the Indian Contract Act.
- (e) The learned arbitrators have failed to appreciate that the opponent was fully conversant with the intricacies of drilling operations. In this context in the absence of any evidence that the assessment so made by the applicant was arbitrary or unreasonable the learned arbitrators should

not have interfered and tried to make their own assessment of damages.

- (f) The learned arbitrators have materially erred in holding that only 1/3 of value of certain equipments procured by the applicant and 1/3 value of overhead charges could be taken into consideration to arrive at reasonable compensation to be levied by the applicant under claim No.1.
- (g) In respect of paragraph 1.13 of the award, it has been stated that the learned arbitrators have completely ignored the facts of the case and submissions made in this regard.
- (h) That the learned arbitrators have erred in accepting the delay under claim No.1 and there is total non-application of mind on the part of the learned arbitrators.
- (i) That the learned arbitrators have erred in awarding the amount to the claimant in respect of lodging charges, for the particular periods.
- (j) That the learned arbitrators have erred in in law while deciding claim No.3, in not appreciating the fact that the burden lay heavily upon the claimant-company to prove that the night movements of rigs were duly authorised by legal permits issued by the R.T.A. and the claimant-company had failed to discharge the said burden.
- (k) That the learned arbitrators have erred in not taking into consideration the fact that, it was highly unsafe and hazard to move rigs and other heavy equipments at night and that the opponent-corporation was completely justified in refusing payments.
- (l) That the arbitrators have erred in not appreciating the fact, apart from the restrictions imposed by law, prudence demanded that no rig was moved by night and in the circumstances, the opponent-corporation could not have been asked for the holdups during night time.
- (m) That the learned arbitrators have erred in holding that the opponent-corporation's rigs were

held up during day hours without their fault and making a total award of Rs.6,13,170.19 ps. for holdings of 469 hours in all under claim No.3.

- (n) That the arbitrators decision upon claim No.4 for the extra kilometre of rig movement beyond 15 kms. is based on surmises.
- (o) That the arbitrators have erred in awarding Rs.2,44,244.73 for 59 extra kms. under claim No.4.
- (p) That the learned arbitrators have erred in discarding outright, without proper reasons, the offer made by the opponent-corporation of US Dollar 100 per extra km.
- (q) That the learned arbitrators have erred in assuming that the bills produced by the opponent-corporation represented actuals and in awarding the deducted amount as alleged under claim No.6-A.
- (r) That the learned arbitrators have erred in law in not appreciating that fact, while deciding claim No.6-B, that, if no provision was made in the contract for payment on account of mud loss in formation, then the corporation could not be made liable to reimburse the claimant-company on that count.
- (s) That the learned arbitrators have erred in not appreciating the fact that the terms of contract between the parties were settled after protracted negotiations and further in awarding Rs. 3,60,969.24 under claim 6-B.

The Trial Court, after considering the aforesaid objections and hearing the Advocates appearing for the parties as also examining the relevant proposition of law, allowed the application of the Arbitrators under Section 14 of the Act, rejecting the aforesaid objections and directing to make the award Rule of Court. Hence, this appeal at the instance of original respondent-Corporation, who is the appellant herein, invoking the provisions of Section 39(1)(vi) of the Act.

The learned counsel appearing for the appellant-Corporation has taken us through the record of the arbitration proceedings and of the Trial Court in the course of his submissions. The copies of the same were

given to us by the learned counsel, Mr. Shah, and we have had the benefit of examining the entire record and proceedings, including the award made by the arbitrators. We have also given our anxious thoughts to the impugned order and judgment of the Trial Court. After having examined the entire relevant record and material proceedings and the submissions raised by learned counsel, Mr. Shah, for and on behalf of the appellant-corporation and also considering the relevant provisions of the Act, we find no merits and substance in the appeal and any invalidity or illegality in the impugned order and the judgment of the Trial Court recorded under Section 14 of the Act. Therefore, in our opinion, the present appeal is without any substance and is required to be rejected at the threshold.

Section 14 of the Act provides for filing of an award after signing by the arbitrators before the Court concerned, so as to make it the Rule of the Court. In other words, the award reached by the arbitrators could receive the judicial sanction and the force of a decree in view of the provisions of Section 14. There is no dispute about the fact that the Trial Court followed the procedure laid down in Section 14 as well as relevant rules.

Section 14 has been divided into three parts:

(1) After the award is ready, the arbitrators are required-

- (i) to sign it, and
- (ii) to give notice of the same to the parties.

The notice should be in writing and should state-

- (i) that the award has been made,
- (ii) that it has been signed, and
- (iii) the amount of fees and charges payable in respect of the arbitration and the award.

(2) The arbitrators or the umpire are bound to file in Court-

- (i) the award itself or a signed copy of the same,
- (ii) depositions, if any, which may have been reduced to writing by them,
- (iii) all documents produced and proved before them.

The arbitrators or the umpire may be required to
file the award and the documents-

(a) at the request of-

- (i) either party; or
- (ii) any person claiming under such
party; or

(b) at the direction of the Court.

Before filing the papers, however, the
arbitrators or the umpire may insist upon the
payment to them of-

- (i) all fees and charges due in respect of
the arbitration and award; and
- (ii) costs and charges of filing the papers in
Court.

When the papers have been filed, notice of the
same shall be given to the parties by the Court.

(3) Where the arbitrators or the umpire state a
special case for the opinion of the Court under
Section 13(b), the Court shall-

- (i) give notice of the same to the parties;
- (ii) hear them; and
- (iii) pronounce its opinion thereon.

The opinion of the Court so pronounced is to be added to
and form part of the award.

It could very well be seen from the aforesaid scheme of
the provisions of Section 14 of the Act that the
proceeding under Section 14 is a judicial proceeding and
the question should be determined after hearing the
parties.

After having examined the record, we are satisfied that
the Trial Court has observed the procedure prescribed in
Section 14 and after issuing the notice and hearing the
parties has rendered the impugned order and judgment
under challenge. The award of the arbitrators is ordered
to be made a Rule of the Court, exercising its powers
under Section 14. We have no hesitation in finding that
the requirements of Section 14 are fully satisfied.

Section 15 of the Act prescribes power of the Court to modify the award, to which we are not concerned in this proceeding. Section 16 provides power of the Court to remit the award in the circumstances enumerated therein. Section 17 provides judgment in terms of the award.

It would be interesting to know at this juncture that the objections which came to be filed in the course of the proceedings under Section 14 of the Act were referable to the available objections under Section 30. Section 30 of the Act provides grounds for setting aside the award of the arbitrators. It would be, therefore, necessary, at this juncture, to refer the said provision, which reads as under :-

"30. Grounds for setting aside award:- An award shall not be set aside except on one or more of the following grounds, namely -

- (a) that an arbitrator or umpire has misconducted himself or the proceedings;
- (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;
- (c) that an award has been improperly procured or is otherwise invalid."

It could very well be seen from the aforesaid provision that whosoever challenging the validity and legality of the award, in order to succeed, is obliged to prove one or more grounds stated in Section 30. In fact, the entire purpose and the scheme of Section 30, undoubtedly, indicates that the award of the Arbitrator is final and it shall not be set aside except on one or more of the grounds enumerated in Section 30. The object of such provisions and the underlying design of the Arbitration Act has been to see that the proceedings under the Arbitration Act shall not be treated as beginning of the litigation, but should lead to the point of end or the expiry of the dispute. This very benign object is in clear terms incorporated in the new Arbitration and Conciliation Act, 1996. In Chapter VIII of the new Act, specific and clear provisions are prescribed for finality of the arbitral awards. It would be also interesting to note that specific provision has been made in this behalf in the New Act, whereby, the judicial intervention extent is prescribed. In section 5, it has been clearly laid

down in the New Act that notwithstanding anything contained in any other law for the time being in force, no matters governed by this part, no judicial authority shall intervene except so provided in the Act. By virtue of the provisions of Section 5, all other statutes have been excluded from the operation insofar as they relate to intervention by any judicial authority in matters covered by Sections 1 to 43 (covered under Part I) of the new Act. Needless to mention that the Courts shall have power to intervene if so permitted specifically by any of the provisions contained in Part I of the new Act. Otherwise also, it is provided in the Act itself that it is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. In other words, it can safely be concluded, being an exclusive law on the subject on the subject, aid of other statutes cannot be taken to allow judicial intervention not so permitted by the Act itself. What we try to highlighten and bring at home is that the indirect purpose which was sought to be conveyed in the old Act has now been specifically provided in the new Act. Unfortunately, under the old Act, the very purpose and design cutting short the litigation which proved to be exhaustive and lengthy sought to be reduced to the domestice arbitral form with a view to avoid delay, by experience and by passage of time has been battered and shattered. Bearing in mind the experience of the past and the mistakes under the old Act, new provisions have been incorporated. This is what we highlight, at this juncture, with a view to place it on record that ordinarily the arbitral award of the arbitrators selected by the parties for their differences and disputes should be accepted as final. The scope and ambit of the judicial review is circumscribed in limited parameters. One of them is provided in Section 30 of the old Arbitration Act, as we stated hereinbefore.

Section 30 of the Act is exhaustive of the grounds on which the arbitral award could be questioned and set aside by the Court competent. It gives grounds on which it could be set aside. It is divided into three classes. However, in reality, there are as many as following six grounds for setting aside the arbitral award :-

- (1) That the arbitrator or the umpire has misconducted himself;
- (2) That the arbitrator or the umpire misconducted the proceedings;
- (3) That the award was made after the arbitration was kept in abeyance or suspended;

- (4) That the award was made after the proceedings became invalid under Section 35 providing effect of legal proceedings on arbitration;
- (5) That the award was improperly procured; and
- (6) That the award is otherwise invalid.

If a party wants to succeed in getting arbitral award quashed and set aside, it is incumbent upon it to show one or the more of the existent aforesaid grounds prescribed in Section 30 of the Act. No doubt, the expression "misconduct" has not been statutorily defined. However, the dictionary meaning of the expression "misconduct" can be resorted to. Misconduct may be in law or in fact or in both. The term "misconduct" would appear to be employed in the provision in its widest amplitude, thus, including mistake in law or fact. No doubt, the Court has also inherent power to set aside an award which is bad on its face as not complying with the requirements of finality and certainty.

The inherent power to set aside also extends to an award which exceeds the arbitrator's jurisdiction and, possibly, to cases where fresh evidence has become available. The inherent power is also extended to set aside an award on the ground of an error of law or of fact in the face of the record.

In view of the aforesaid relevant and material legal setting and in the backdrop of the relevant facts, could it be said even for a moment that the impugned award and judgment of the Trial Court making the award of the arbitrators a Rule of Court has, in any way, become liable to set aside or is otherwise invalid? Our dispassionate and comprehensive examination of the facts and relevant law commands and demands that no existence of any available legal or statutory ground is successfully shown, which would warrant the interference of this Court against the impugned order and judgment of the Trial Court.

We have not been able to appreciate the grounds stated in the memo of appeal. No doubt, at the stage of the hearing, learned counsel Mr. Shah submitted that the impugned order and judgment is bad and invalid mainly on the ground that the ground (i) that a speaking order is not passed; (ii) there was refusal to state the facts on the part of the arbitrators; and (iii) that there was procedural abuse.

As we have observed, hereinbefore, the impugned award of the arbitrators, who are of high eminence and reputation

- one of whom happened to be a retired Hon'ble Judge of the Apex Court of the land - by no stretch of imagination, could be said to be a non-speaking or non-reasoned order. Claims raised by the claimant-company have been examined, analysed and appreciated by the arbitrators itemwise; wherever it was possible and permissible, it is granted; and wherever and whenever the claim is found vague or impermissible, it has been rejected. It has been noticed by us, without any shadow of doubt, that the items are discussed in the award comprehensively and threadbare. All the submissions raised in connection with each claim have also been dealt with specifically and exhaustively. It leaves no any manner of doubt in our mind that the manner and mode in which the items of claim raised by the claimant-company are fully justified, requiring no interference much less under Section 39(1)(vii). Let us illustrate. In claim No.1, the demand was for refund of liquidated damages deducted to the extent of US Dollar 708661.40 plus Rs.15,08,000/-. This was claimed by the claimant by way of liquidated damages on account of late mobilisation of rigs and spudding of wells beyond the due dates prescribed by the contract. The contract was signed on 13th September, 1988 and Article 6 of the same dealt with compensation in other words liquidated damages. The arbitrators, after considering overall picture emerging from the record in this behalf, reached to the conclusion to award and directed that only sum of Rs.25.99 lacs be retained by the appellant-corporation and the balance of Rs.90,82,584/- be paid back to the claimant-company. We are fully convinced and satisfied that the arbitrators have meticulously and minutely dealt with the claims and relevant supporting documents and material submissions. This is what we have highlighted by way of illustration. So is the case of claim No.2 and other claims. Since, broadly, we are in agreement with the proposition laid down by the Trial Court and the reasons assigned therein, we do not propose to discuss in extenso, with the result, in our opinion, the first ground of attack of the impugned judgment and award that it is not a speaking or reasoned order must fail. In our opinion, it is not only a speaking and reasoned order, but it is, incidentally, noticed to be a balanced one.

That will lead us to the appreciation of the second ground of attack which pertains to the refusal to state the facts. We are at great loss to appreciate and accept this submission, even on the plain perusal of the arbitral award. We have no hesitation in finding that the relevant material and important facts required to be stated have been clearly enumerated by the arbitrators.

It cannot be gainsaid even for a moment that relevant and material aspects are considered and taken into account. We are of the opinion that the arbitrators have examined, appreciated and, thereafter, adjudicated the disputes and differences considering all the relevant and material facts and aspects of the case. Nothing has been successfully pointed out from the record of the presesent case, which would prompt that material facts are not considered or there is a refusal of stating the material facts. We, therefore, have to plead our inability in accepting the second ground of attack on the impugned order and judgment of the learned Civil Judge. Therefore, the second condition also must fail. Accordingly, it is rejected.

Obviously, it will now take us to the examination and appreciation of the third ground of attack, wherein it is submitted that the Arbitrator's award is tainted with procedural abuse. We have not been able convince ourselves from the record of the present case nor it has been successfully pointed from any part of the record which could even lead to an inference of abuse of procedure. As observed by us hereinbefore in the foregoing paragraph, the guidelines and procedure prescribed in the Act and the Rules have been followed by the Arbitrators before reaching the conclusion and passing the award and making it published. Which procedure is not followed and how has not been specifically pointed out, leaving us in the era of ambiguity. We have not been able to even guess from the record as to which part, where and how there is a procedural vice so much so that it woud call for judicial review and interference and resultant setting aside of the arbitral award. In the result, the last and the third ground challenging impugned order and judgment of the Civil Court must also fall to the ground. Consequently, it is also thrown overboard.

After taking into account the entire catalogue of facts and circumstances, the terms and conditions of the contract, and more so clause 26 relating to the arbitration in the contract in question, and the examination, appreciation and adjudication rendered by the arbitrators with unanimity in relation to the differences and disputes arising ;out of the contract between the parties and also the analaysis and appreciation of the claims made by the original claimant-company and the manner and mode in which the objections raised by the original-respondentappellant-Corporation herein, we are satisfied that the impugned judgment directing the award

to be a Rule of Court holding that there is no fit case for setting it aside is fully justified requiring only dismissal of this appeal, wherein the provisions of Section 39(1)(vi) of the Act are sought to be taken in support of the grounds in the appeal. We have no hesitation to find and hold that the appeal is without any substance and meritless. Therefore, it must be rejected at the inception. Accordingly, it is rejected at the threshold confirming the impugned order and the judgment of the Civil Court.

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